JOHN TRAWE KUDA

v.

ADTEC SDN. BHD.

HIGH COURT SABAH & SARAWAK, MIRI
TUAN RICHARD MALANJUM J
[SUIT NO: MR 40 OF 1994]
18 SEPTEMBER 1995

CIVIL PROCEDURE: *Striking out - Appeal to Judge-in-Chambers against decision of Senior Assistant Registrar - Application for leave to amend reply and to admit fresh evidence - Whether defendant prejudiced - Whether injury to defendant can be compensated by costs.*

CIVIL PROCEDURE: *Appeal to Judge-in-Chambers against decision of Senior Assistant Registrar - Leave for admission of fresh evidence sought - Whether appeal dealt with as a rehearing - Whether new issues existed at the time of hearing before the SAR - Whether O. 56 r. 3A of Rules of the High Court 1980 applicable - Whether conditions in O. 56 r. 3A satisfied.*

On 3 September 1991, a plane crashed in Kuala Layun, Sarawak killing 14 of the passengers. An inquest was conducted but no legal action was taken until three years later. The defendant applied to strike out the plaintiff's action on the ground of limitation which was allowed by the learned Senior Assistant Registrar ('SAR') and the plaintiff appealed to the Judge-in-Chambers against that decision. Prior to the appeal proper, the plaintiff applied for leave to amend the reply and to admit fresh evidence contained in two affidavits; which application was heard first.

The plaintiff submitted *inter alia* that leave should be granted on the grounds that new issues were involved and that amendment could be done at any stage of the proceeding provided the opposing party does not suffer any prejudice which cannot be compensated by costs. The defendant objected stating that the action had been struck out by the SAR earlier and therefore, there was no reply to amend. Counsel for the respondent further stated that the application could only succeed if there were good and strong grounds.

On the issue of fresh evidence, the plaintiff submitted that the affidavits showed an admission of liability by the defendant and fraudulent concealment of evidence, issues which were not originally before the SAR. The plaintiff also claimed that an appeal to Judge-in-Chambers was to be treated as a rehearing and that O. 56 r. 3A of the Rules of the High Court 1980 ('RHC') was not applicable and if applicable, the conditions therein had been satisfied. On the contrary, the defendant contended that O. 56 r. 3A had not been satisfied in

that the plaintiff failed to show any reasonable diligence in attempting to secure the evidence of the alleged admission before the hearing of the defendant's application. Furthermore, he claimed that such alleged admission would not have had any determining influence on the decision of the SAR.

Held:

[1] There is no reason to refuse leave to amend by the plaintiff as the Court finds that no injury or prejudice will be suffered by the defendant which could not be compensated by costs.

[2] Rule 3A of O. 56 of the RHC was inserted *vide* PU(A) 192/93 but it has not changed the nature of the hearing in an appeal to a Judge-in-Chambers. That would necessarily mean that the parties are at liberty to file further affidavits for consideration. Yet if new evidence is involved, then r. 3A should be adhered to. In the present case, it is common ground that the two affidavits sought to be admitted at the hearing of the appeal contain matters which were not canvassed before the SAR. Hence r. 3A should be applicable.

[3] In respect of the alleged admission, the plaintiff was frank and honest to disclose that he did attempt to call Datuk Robert Jacob Ridu. But it was not obvious at that point of time that such evidence was existing and available. The Court is inclined to agree with learned Counsel for the plaintiff that the attempt to contact the Datuk was only to cover all the possibilities. Surely that should not be taken as the basis to say that there was lack of reasonable diligence to obtain such evidence.

[4] It would be over-presumptous to say that the evidence of the admission would not have had any determining influence upon the decision of the SAR even if it had been presented to him. In the Court's view, it could have involved the computation of the limitation period. Anyway, such an issue including the implications to be attributed to the documents and the argument that the alleged admission did not come from the defendant should be heard during the hearing proper of the appeal.

[5] With regard to the averment of fraudulent concealment of evidence, it was not in dispute that the inquest hearing was only completed on 25 May 1995, a day after the hearing before the SAR and the record of the proceedings of the inquest was only available at the end of July 1995. Although Counsel for the defendant submitted that the evidence was already available before the hearing as Counsel for the plaintiff was present during the inquest, there was no rebuttal to the submission that Counsel for the plaintiff was not present in the earlier part of the inquest where the employees of the defendant gave their version as to the cause of the crash. Such facts should satisfy the first requirement of r. 3A.

[6] As for the second requirement of r. 3A in relation to the second fresh evidence, again if it was before the SAR, then the computation of the limitation period could have been affected provided it was given due consideration. Counsel for the defendant argued that her client should not be blamed for any concealment as it did not have such evidence at the material time. That argument should be heard at the hearing proper of the appeal. To consider it at this stage would tantamount to considering the merits of the appeal and that would be premature.

[7] The Court is satisfied that the requirements of r. 3A were fulfilled. Therefore the applications of the plaintiff are granted and hearing of the appeal is fixed on 27 October 1995.

[Plaintiff's application granted]

Cases referred to:

Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229 ***(refd)***

Chen Chow Lek v. Tan Yew Lai [1983] 1 MLJ 170 ***(refd)***

Ladd v. Marshall [1954] All ER 745 ***(refd)***

Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd. [1994] 2 MLJ 97 ***(refd)***

Chiew Soon @ Chiew Chun Soon v. Tay Tai Aun [1990] 1 CLJ 469 ***(refd)***

Amanah Factors Sdn. Bhd. v. Trans Resources Corp Sdn. Bhd. & Ors [1992] Mallal's Digest, 4th Edn, para. 267 ***(refd)***

Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia [1995] 2 MLJ 194 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 56 r. 3A

Other sources referred to:

Supreme Court Practice, Vol. 1, 1991, p. 368

For the appellant - Raymond Szetu (Antalai Sawing with him); M/s. Antalai, Trang & Co.

For the respondent - Perpetua Phang; M/s. Reddi & Co.

JUDGMENT

Richard Malanjum J:

Background Facts

On 3 September 1991 a plane, a skyvan model, crashed in Kuala Layun, Long Seridan, Baram, Miri, Sarawak with 18 passengers and two crew personnel on board. As a result of the crash 14 of the passengers perished. An inquest was conducted. But no legal action was filed until 3 September 1994. And by way of a summons-of-chambers dated 2 March 1994 the respondent/defendant applied to strike out the action on the ground of limitation. The application was served on 15 March 1995 with the hearing scheduled on 21 April 1995. However, that hearing was adjourned to 24 May 1995 on the application of

the learned Counsel for the appellant/plaintiff to enable him to file an affidavit in opposition. That was done and served on the respondent/defendant on 22 May 1995. Hearing of the application proceeded on 24 May 1995 and the Senior Assistant Registrar (SAR) gave his decision on the same day allowing the application of the respondent/defendant and striking out the action of the appellant/plaintiff.

There is now an appeal to this Court against that decision. The hearing was fixed on 30 August 1995. But before proceeding to deal with the appeal, learned Counsel for the appellant/plaintiff submitted that the applications to amend the reply and to admit fresh evidence should be heard first. That was done and the ruling was accordingly given on 30 August 1995.

In delivering my ruling I stated that in the event of an appeal I would give my grounds before the hearing proper of the appeal. As the respondent/ defendant has indicated its intention to appeal, this is therefore my grounds of decision.

The Applications

By way of a summons-in-chambers dated 16 August 1995 (Encl. 29) the appellant/plaintiff applied for leave as follows, (*verbatim*):

1. Admit the affidavits of John Trawe Kuda and Datuk Robert Jacob Ridu affirmed on 14 August 1995 during the hearing of the Appeal to the Judge-in-Chambers against the decision of the Senior Assistant Registrar given on 24 May 1995 copies of which have been filed in Court.

2. Amend the plaintiff's reply, a copy of the amended reply is attached herein and marked "A".

The Contentions of the Respective Parties and Findings

For convenience I hereby summarize the submissions of the learned Counsel for the respective parties for each of the applications in the order they were made before me.

(i) For leave to amend the reply:

For the appellant/plaintiff, learned Counsel submitted that leave should be granted on the grounds that:

(a) new issues were involved;

(b) an appeal from the Senior Assistant Registrar should be considered a continuous process; and

(c) amendment can be done at any stage of the proceeding, including an appeal stage, so long as the opposite side does not suffer any prejudice which cannot be compensated in terms of costs.

In objecting to the application, learned Counsel for the respondent/defendant argued that the application should be refused since there was no reply to be amended, the action having been struck out by the SAR earlier on and which is yet to be reversed. Further, learned Counsel stated that for the application to succeed there must be good and strong ground. The case of *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 was cited where his Lordship Lee Hun Hoe (CJ Borneo) delivering his short judgment in the Federal Court said this, at p. 230 G (left):

> This Court will only permit amendment on very good and strong justification. Leave to amend was refused.

Apart from that submission, learned Counsel for the respondent/defendant did not indicate any injury or prejudice to the respondent/defendant which could not be compensated in terms of costs if the application to amend was allowed.

Now, it is settled that amendments may be allowed "at any stage of the proceedings", even on appeal "if it will not do the opponent party some injury or prejudice him in some ways that cannot be compensated for by costs or otherwise."

(see: *Supreme Court Practice* Vol. 1, 1991 p. 368)

But the learned Counsel for the respondent/defendant said that there was nothing to amend as the action had been struck out. With respect, I do not think such a simplistic approach can be entertained. In the case of *Chen Chow Lek v. Tan Yew Lai* [1983] 1 MLJ 170, the High Court dismissed the action of the appellant with costs. On appeal to the Federal Court, the appellant sought to amend his statement of claim. That was allowed and his Lordship Salleh Abas FJ (as he then was) said this at p. 172 I (right):

> We allowed the motion because we think that it is fair that we should do so as the proposed amendment is fully covered by evidence in the records and not in any way prejudicial to the respondent.

No doubt in that case the proposed amendment was covered by the evidence adduced. But such a situation could not arise in the instant case as there was no trial. Nevertheless, the more relevant point is the fact that the action was dismissed by the High Court and if going by the contention of the learned Counsel in the present case, such an application to amend should not have been allowed. But it was allowed thereby rendering such a contention to be without merit. I had therefore no reason to refuse leave to the application to amend by the appellant/plaintiff. Moreover, I found no injury or prejudice that might be suffered by the respondent/defendant which could not be compensated for by costs. Leave to amend the reply as proposed was the therefore granted.

(ii) Leave to admit at the hearing of the appeal the affidavit of the appellant/plaintiff - John Trawe Kuda sworn to on 14 August 1995 and the affidavit of Datuk Robert Jacob Ridu also sworn to on 14 August 1995.

Both the above affidavits were annexed as "A" and "B" respectively to the affidavit of the appellant/plaintiff sworn to on 15 August 1995 and filed in support for the application for leave.

For the appellant/plaintiff it was submitted that these affidavits should be admitted at the hearing of the appeal for the following reasons, in summary:

(a) that new issues are involved which were not before the SAR namely, admission of liability by the respondent/defendant and fraudulent concealment of evidence;

(b) that on appeal to a Judge-in-Chambers, the Judge is to treat matters as though coming up for the first time;

(c) that in practice new issues on appeal should be allowed although to be most jealously scrutinised;

(d) that the new issues were existing at the time of the hearing before the SAR but were not within the reach of the appellant/plaintiff;

(e) that O. 56 r. 3A of the Rules of the High Court 1980 (RHC) and the principle in *Ladd v. Marshall* [1954] All ER 745 are not applicable in the present case;

(f) alternatively, that the conditions under O. 56 r. 3A of RHC and the principle in *Ladd v. Marshall (supra)* have been satisfied; and

(g) that legal technicalities or mistake should not be allowed to frustrate any just claim.

In objecting to the application, learned Counsel for the respondent/defendant contended that the application should be dismissed in that O. 56 r. 3A of RHC had not been satisfied in respect of the alleged admission and the fraudulent concealment of evidence. Learned Counsel argued that the appellant/plaintiff failed to show any reasonable diligence in attempting to secure the evidence of the alleged admission before the hearing of the application of the respondent/defendant. It was further submitted that such alleged admission would not have had any determining influence on the decision of the SAR.

Similar arguments were marshalled in respect of the allegation on fraudulent concealment of evidence. It was also added that the respondent/defendant could not have concealed evidence which it did not have at the material time.

I will deal first with the nature of the hearing in an appeal to a Judge-in-Chambers from a decision of a Registrar which includes a Senior Assistant Registrar.

To begin with, the comment of his Lordship Edgar Joseph Jr SCJ (now FCJ) in *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd.* [1994] 2 MLJ 97 appears to be relevant. At p. 106, his Lordship said this:

> Two things are plain from the above passage in the judgment of Lord Atkin (in *Evans v. Bartlam* [1937] AC 473; [1937] 2 All ER 646), namely:
>
> (1) in an appeal from a discretionary order of the Master (equivalent here to a Senior Assistant Registrar) to a Judge-in-Chambers, the Judge exercises his own discretion as though the matter comes before him for the first time, unfettered by the previous exercise of the Master's discretion; and
>
> (2) so far as the Master's decision is concerned, the Judge will give it the weight it deserves.

In *Chiew Soon @ Chiew Chun Soon v. Tay Tai Aun* [1990] 1 CLJ 469 at 409 I (left) his Lordship Zakaria Yatim J (as he then was) said this:

> On 16 November 1988, I ruled that the two affidavits were admissible for the purpose of the appeal. My ruling was based on two grounds. Firstly, an appeal from the Registrar to a Judge-in-Chambers is dealt with by way of an actual rehearing. The Judge hearing the appeal treats the matter as though it is coming up for the first time. Secondly, it is common practice for the Judge-in-Chambers, subject to costs, to admit further or additional evidence by affidavit. The *Standard Chartered Bank v. Kentland Sendirian Berhad & Anor* [1989] 1 CLJ 1126.

Similar view was also expressed by his Lordship Abdul Malek J in *Amanah Factors Sdn. Bhd. v. Trans Resources Corp Sdn. Bhd. & Ors* [1992] *Mallal's Digest,* 4th Edn, para. 267 when he said that an appeal against a decision of a Senior Assistant Registrar "comes by way of rehearing before the Judge. It follows that parties are at liberty to file further affidavits for consideration, and the Judge is bound to consider all affidavits filed before the hearing of the appeal.

And in *Negara Properties Sdn. Bhd. v. Akitek Bersekutu Malaysia* [1995] 2 MLJ 194, his Lordship Visu Sinnadurai J following the case of *Seloga Jaya Sdn. Bhd. v. Pembinaan Keng Ting (Sabah) Sdn. Bhd. (supra)* also observed that an appeal against a decision of a Senior Assistant Registrar is by way of an actual rehearing and that the Judge is in a 'position to exercise an independent discretion' of his own to consider the issue before him.

Now, I am aware that r. 3A of O. 56 of RHC was inserted *vide* PU(A) 192/93. But I do not think it has changed the nature of the hearing in an appeal to a Judge-in-Chambers as described in the above-mentioned cases. And

that should necessarily mean that the parties are 'at liberty to file further affidavits for consideration'. Yet if new evidence is involved then r. 3A should be adhered to.

In the present case it is common ground that the two affidavits sought to be admitted at the hearing of the appeal contain matters which were not canvassed before the SAR. Hence, r. 3A should be applicable.

Order 56 r. 3A of the RHC reads:

> At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
>
> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

This rule incorporated the pronouncement of Lord Denning MR in *Ladd v. Marshall (supra)* at p. 748:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

As indicated hereinabove that the two affidavits which the appellant/plaintiff is seeking to introduce contain two matters, namely, on the alleged admission of the respondent/defendant in the form of letters and on fraudulent concealment of evidence related to the record of proceeding of the inquest. They were not submitted before the SAR during the hearing of the application of the respondent/defendant.

Having heard the respective submissions of the learned Counsel for the parties and having read the relevant affidavits, I was satisfied that the requirements of r. 3A were fulfilled. I therefore granted the leave as prayed for.

In respect of the alleged admission, the appellant/plaintiff was frank and honest to disclose that he did attempt to call Datuk Robert Jacob Ridu. But it was not obvious at that point in time that indeed such evidence was existing and available. I was inclined to agree with the learned Counsel for the appellant/plaintiff that the attempt to contact Datuk Robert Jacob Ridu was only to cover all the possibilities. Surely that should not be taken as the basis to say that there was lack of reasonable diligence to obtain such evidence. After all the respondent/defendant did not rebut the state of knowledge of the appellant/

plaintiff as averred in para. 12 of his affidavit sworn to on 15 August 1995 (Encl. 29). That therefore settled the first requirement.

As regards the second requirement it would be over-presumptuous to say that such evidence would not have had any determining influence upon the decision of the SAR even if it had been presented to him. In my view it could have involved the computation of the limitation period. Anyway, such an issue including the implications to be attributed to the documents and the argument that the alleged admission did not come from the respondent/defendant should be heard during the hearing proper of the appeal. I also noted that there was no challenge on the authenticity of the letters connected to the alleged admission or their apparent credibility.

With regard to the averment of fraudulent concealment of evidence, it was not in dispute that the inquest hearing was only completed on 25 May 1995, a day after the hearing before the SAR. And the record of the proceeding of the inquest was only available at the end of July 1995. Surely such a fact should satisfy the first requirement of r. 3A.

Learned Counsel for the respondent/defendant submitted that the evidence was already available before the hearing of 24 May 1995 as the Counsel for the appellant/plaintiff was present during the inquest. That may be true. But the appellant/plaintiff should also be entitled to wait for the official record of the proceeding of the inquest in order to consider the matter as a whole before making any conclusion. And that should be so in this case as there was no rebuttal to the submission that the Counsel for the appellant/plaintiff was not present in the earlier part of the proceeding of the inquest where the employees of the respondent/defendant gave their version as to the cause of the crash.

As for the second requirement of r. 3A in relation to the second fresh evidence, again I must say that if it was before the SAR, then the computation of the limitation period could have been affected provided it was given due consideration. Learned Counsel for the respondent/defendant argued that her client should not be blamed for any concealment as it did not have such evidence at the material time. That argument should be heard at the hearing proper of the appeal. To consider it at this stage would tantamount to considering the merits of the appeal and that would be premature. And as to whether the fresh evidence is credible I do not think that was in dispute between the parties. After all the matter involves the official record of proceeding of the inquest.

I did also consider the other arguments of the learned Counsel for the respondent/defendant before coming to my decision. I did not find them convincing either because they were trivial or not relevant in determining the application.

In addition to the foregoing reasons I would say that there could have been an obvious inconsistency if this second application of the appellant/plaintiff was refused after allowing the first one, i.e. leave to amend the reply. After all the proposed amendments also dealt with the same matters.

Conclusion

Accordingly, for the above reasons that I granted both the applications of the appellant/plaintiff and fixed the hearing of the appeal on 27 October 1995 at 10 a.m.

Reported by Cindy Chan